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In The

Supreme Court of the United States

THE UNIVERSITY OF ALABAMA AT BIRMINGHAM, BOARD OF TRUSTEEES, et al.,

Petitioners,

v.

PATRICIA GARRETT and MILTON ASH,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF THE STATES OF MINNESOTA, ARIZONA, CONNECTICUT, ILLINOIS, IOWA, KENTUCKY, MARYLAND, MASSACHUSETTS, MISSOURI, NEW MEXICO, NEW YORK, NORTH DAKOTA, VERMONT, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE* STATES

This *amici curiae* brief is submitted on behalf of fourteen (14) states: Minnesota, Arizona, Connecticut, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Missouri, New Mexico, New York, North Dakota, Vermont, and Washington. The *amici curiae* States strongly support affirmance of the Eleventh Circuit Court of Appeals' decision and the resulting use of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994 and Supp. III 1997) ("ADA"), by their citizens without limitation. Although the States more typically advocate the application of Eleventh Amendment immunity, this case is different. The extremely important public policy underlying the landmark ADA legislation and the Eleventh Amendment jurisprudence as applied to the ADA, cause the *amici curiae* States, consistent with the obligation of their respective attorneys general to protect the public interest, to file this *amici curiae* brief.

Where, as here, a legislative enactment constitutes a valid exercise of Congress's Section 5 powers under the Fourteenth Amendment, the States have a compelling interest in the full implementation of the law. As such, to eradicate the effects of the extensively documented, long-term, pervasive and invidious discrimination against people with disabilities, it is critical that the States be leaders in facilitating this duly enacted Section 5 legislation. Allowing state employees and other citizens to enforce their ADA rights without restriction furthers the ADA's important equal protection-based purpose and the *amici curiae* States' desire to eliminate discrimination against the members of our society with disabilities. Under these

circumstances, the *amici curiae* States believe it is imperative to support the validity of the ADA in its entirety.[1]

SUMMARY OF ARGUMENT

This Court should affirm the Eleventh Circuit's decision and hold that the ADA's express abrogation of the States' Eleventh Amendment immunity was proper. The Eleventh Circuit's decision correctly applies well-settled principles of constitutional law.

The Court has often recognized that people with disabilities suffer culturally-based discrimination resulting from irrational fears, prejudices and ignorance. *See, e.g., Alexander v. Choate,* 469 U.S. 287 (1985); *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432 (1985); *School Bd. of Nassau County v. Arline,* 480 U.S. 273 (1987). Consistent with this judicial precedent, Congress had overwhelming evidence of widespread and invidious discrimination against individuals with disabilities, including such discrimination by the States, to properly invoke its Section 5 powers. Both the record before Congress and common sense shows that this pervasive, societal discrimination against people with disabilities undoubtedly

[1] An individual state undoubtedly could waive its Eleventh Amendment immunity. *See Idaho v. Coeur d'Alene Tribe,* 521 U.S. 261, 267 (1997). The applicability of the ADA, however, should not depend on the fortuity of the state of residency of a particular person with a disability. Such a result would severely undermine the important purpose of this national legislation and the proper application of Congress's Section 5 authority. *See supra* pp. 1-2.

impacted state decisions. Indeed, State officials were not immune from the negative attitudes and unfair stereotypes about people with disabilities that pervaded our society, and thus States unfortunately engaged in numerous activities that unconstitutionally discriminated against individuals with disabilities. Congress's unequivocal and unqualified findings of rampant discrimination against people with disabilities, including activities engaged in by the States, are soundly based.

Congress also provided for a congruent and proportional remedy for the widespread constitutional violations it found. In accordance with the decision in *City of Cleburne*, 473 U.S. at 442-443, where this Court recognized that the legislative branch is in a better position than the judiciary to address disability discrimination, Congress tailored appropriate and balanced legislation to remedy and deter continued discrimination against people with disabilities. The legislative response was commensurate with the Congressional record and findings establishing pervasive, culturally-based disability discrimination. As authorized by Section 5 of the Fourteenth Amendment, the ADA not only proscribes future discrimination prohibited by the Equal Protection Clause, but also seeks to deter such discrimination.

The important limitations to the ADA's remedial scheme provide further evidence of Congress's proportionate and congruent response to the endemic, nationwide problem of discrimination based on disability. By imposing significant restrictions on the law's applicability, the ADA appropriately balances the needs of the States with meaningful protection against disability discrimination. Accordingly, Congress's enactment of the

ADA's comprehensive remedial scheme, including its abrogation of the States' Eleventh Amendment immunity, was a proper exercise of its power to enforce the Equal Protection Clause of the Fourteenth Amendment and protect people with disabilities from discrimination.

ARGUMENT

IN ENACTING THE ADA, CONGRESS PROPERLY ABROGATED THE STATES' ELEVENTH AMENDMENT IMMUNITY.

Congress may abrogate the States' Eleventh Amendment immunity from suit in federal court if two requirements are met. First, Congress must make its intention to abrogate "unmistakably clear in the language of the statute." *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 640 (2000) (citations omitted). Second, Congress must act pursuant to its Section 5 enforcement powers of the Fourteenth Amendment. *See id.*, 120 S. Ct. at 644; *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996).

It is undisputed that Congress clearly stated its intention to abrogate the States' Eleventh Amendment immunity.[2] Thus, the issue before the Court is whether the ADA constitutes a proper exercise of Congress's Section 5 powers. Supreme Court precedent establishes that the ADA was a valid Section 5 legislative enactment.

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[2] *See* 42 U.S.C. § 12202 (1994) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

A. Congress Properly Invoked Its Section 5 Powers Under The Fourteenth Amendment.

The Court recently re-affirmed that Section 5 of the Fourteenth Amendment is a broad affirmative grant of power to Congress "both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Kimel*, 120 S. Ct. at 644. Moreover, the Court acknowledged that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Id.* at 644 *(quoting City of Boerne v. Flores*, 521 U.S. 507, 536 (1997)).

To be valid, Congressional enactments pursuant to Section 5 must have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* In this regard, "difficult and intractable problems often require powerful remedies," and Section 5 does not preclude Congress from enacting reasonable prophylactic legislation, *id.* at 648, even when the legislation prohibits substantially more state "decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* at 647. Because Congress had overwhelming evidence that people with disabilities had been subjected to long-standing, pervasive and invidious discrimination that denied them the opportunity to participate fully in nearly every aspect of

modern life, including government employment and public services, the ADA's remedial and preventative provisions are both a congruent and proportional response to this nationwide problem.

1. The ADA is supported by compelling evidence of a widespread pattern of culturally-based discrimination against people with disabilities, including discrimination by the States.

This Court has acknowledged that "[t]o be sure, well-cataloged instances of invidious discrimination against the handicapped do exist." *Alexander v. Choate*, 469 U.S. 287, 295 n.12 (1985). In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), members of the Court recognized that people with disabilities had suffered "a history of unfair and often grotesque mistreatment" due to pervasive ignorance and prejudice, *id.* at 454 (Stevens, J., concurring), and that decisions concerning people with disabilities were often the result of "impermissible assumptions" and "irrational fears or ignorance," *id.* at 465, 467 (Marshall, J., concurring and dissenting). The Court in *City of Cleburne* unanimously determined that the city's action at issue had rested upon irrational prejudices against people with mental retardation and was, therefore, violative of the Fourteenth Amendment. *See id.* at 450. The Court subsequently referred to "irrational fears" regarding people with disabilities and noted that "Congress acknowledged that society's accumulated myths and fears about disability . . . are as handicapping as the physical limitations that flow from actual impairment." *School Bd. of Nassau County v. Arline*, 480 U.S. 273,

284 (1987). In *Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176, 2187 (1999), the Court again referenced the "unwarranted assumptions" that impact decisions made with respect to people with disabilities.

It is not surprising that, consistent with the Court's own analysis, Congress found systematic and widespread culturally-based discrimination against people with disabilities. Congress's thorough review resulted in the unequivocal conclusions that "historically, society has tended to isolate and segregate individuals with disabilities," and individuals with disabilities had been "subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society." 42 U.S.C. §§ 12101(a)(2), (a)(7) (1994). Further, as determined by Congress, this discrimination affected every significant life activity, including "employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. § 12101(a)(3) (1994).[3]

The Congressional record is replete with evidence of pervasive societal discrimination against individuals with disabilities. *See, e.g., Coolbaugh v. Louisiana*, 136 F.3d 430, 437-38 & n.4 (5th Cir.), *cert. denied*, 525 U.S. 819 (1998) (chronicling the massive and compelling Congressional record that preceded passage of the ADA). An example of

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[3] Other Congressional findings included that people with disabilities "continually encounter various forms of discrimination, including outright intentional exclusion, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. § 12101(a)(5) (1994).

this powerful evidence is the testimony of Justin Dart, the Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities. After chairing 63 public forums involving every state in the country, Mr. Dart testified that:

> Although America has recorded great progress in the area of disability during the past few decades, *our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human* and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. *The result is massive, society-wide discrimination.*

S. Rep. No. 101-116, at 8-9 (1989); H. Rep. 101-485, pt. 2, at 31-32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 313 (citing Testimony before House Subcommittees on Select Education and Employment Opportunities, Ser. No. 101-37, July 18, 1989, p. 62) (emphasis added).

Likewise, Arlene Mayerson, the directing attorney of the Disability Rights Education and Defense Fund, detailed the many studies that established the "misconceptions and generalizations about disabilities, unfounded fears about increased cost and decreased productivity and outright prejudice towards disabled people." *Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the Subcomms. on Employment Opportunities and Select Educ. of House Comm. on Educ. and Labor,* 101st Cong. 69 (1989). She further testified that "[n]umerous studies have been conducted that conclude that disabled people are subject to the same type of prejudices and discrimination as members of racial and

ethnic minorities." *Id.* at 84. This comprehensive record of pervasive societal discrimination against people with disabilities is not disputed. *See, e.g.*, Brief of Petitioners at 34 (acknowledging "history of societal discrimination against the disabled").

Congress also had substantial and credible evidence from which it reasonably concluded that the States had been part of the widespread pattern of societal discrimination against people with disabilities. This fact distinguishes the ADA from the nearly non-existent record of unconstitutional state action that undermined the validity of both the Religious Freedom Restoration Act[4] and Congress's abrogation of the States' Eleventh Amendment immunity under the Age Discrimination in Employment Act.[5]

a. The conclusion that the States unconstitutionally discriminated against people with disabilities has substantial factual support.

The ADA legislative record documents State actions that were based on irrational stereotypes against people with disabilities and, therefore, unconstitutional under *City of Cleburne*. *See* 473 U.S. at 450. For example, the record before Congress included the United States Commission on Civil Rights report, *Accommodating the Spectrum of Individual Abilities* (1983), which details the history of State institutionalization and other policies that were

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[4] *See City of Boerne v. Flores*, 521 U.S. 507, 531 (1997).

[5] *See Kimel*, 120 S. Ct. at 649.

applied in a discriminatory manner against people with disabilities. *Id.* at 32-37. These State practices often were unconstitutionally based on "irrational fears or ignorance, traceable to the prolonged social and cultural isolation" of people with disabilities. *City of Cleburne*, 473 U.S. at 467 (Marshall, J., concurring and dissenting). As Justice Marshall declared: "A regime of state-mandated segregation . . . emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow." *Id.* at 462. Even recently, the Court stated that "institutional placement of persons who can handle and benefit from community settings perpetrates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life." *Olmstead*, 119 S. Ct. at 2187.

Similarly instructive is the report of the Advisory Commission on Intergovernmental Relations (ACIR), *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Apr. 1989), that was issued approximately one year prior to the enactment of the ADA.[6] The document contains the

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[6] Six members of Congress participated in this bipartisan commission that studied relations among governmental entities. *See* 42 U.S.C. §§ 4271-4273 (1988). Two of the Congressional participants, one from the Senate and one from the House of Representatives, were also members of Congressional committees that considered the ADA legislation. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. ii (1989) (committee and subcommittee membership); *Americans With Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary and the Subcomm. on Civil and Constitutional Rights of the*

results of a comprehensive survey of state officials on impediments to employment of people with disabilities in state governments *Id.* at 70-74. The report shows that thirty-five percent (35%) of state officials considered negative attitudes and misconceptions to be strong impediments to employment of people with disabilities, and that forty-eight percent (48%) considered those reasons to be moderate impediments. *Id.* at 72. In other words, the survey reveals that a total of **eighty-three percent (83%)** of state officials acknowledged that negative attitudes and misconceptions about individuals with disabilities influenced employment decisions of state governments.[7] *Id.* at 72-73.

The ACIR report concluded that even when States had appropriate written disability employment policies, they were often ignored due to "negative attitudes and misconceptions about persons with disabilities and their performance capabilities." *Id.* at 75. The report noted that the reasons underlying state officials' negative attitudes and misconceptions about people with disabilities

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House Comm. on the Judiciary, 101st Cong. ii (1989) (committee and subcommittee membership). The Commission's draft report was referenced on May 9, 1989 in testimony before Congress regarding the ADA. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 306-307 (1989) (statement of Arlene Mayerson).

[7] *See also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 312-313 (statement of Arlene Mayerson) (describing evidence that most government agencies in California refused to hire people with cancer).

included "feelings of discomfort in associating with disabled individuals, inaccurate assessments of their productivity, and concerns about the costs that might be associated with work place accommodations." *Id.* at 73.

The record before Congress also demonstrated that the cultural biases and arbitrary stereotypes regarding individuals with disabilities resulted in the systematic unconstitutional denial of basic educational opportunities. Although Congress had previously enacted legislation to promote educational opportunities for people with disabilities,[8] the 1983 Civil Rights Commission report determined that children with disabilities still were being deprived an appropriate education. *See* U.S. Comm'n on Civil Rights, *supra*, at 28. Based on societal prejudices, many children with disabilities were simply segregated in separate public educational facilities. *See id.* at 29. Other children with disabilities were excluded altogether from public schools. *Id.* at 27. Congress heard numerous examples of children with disabilities who were precluded from attending public schools for a variety of reasons, including that the children used wheelchairs, had epilepsy, and had cerebral palsy that allegedly produced a "nauseating effect" on fellow students and teachers.[9] These widespread practices necessarily had a

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[8] *See* 20 U.S.C. §§ 1400-1491 (1994 and Supp. IV 1998) (originally enacted as the Education of the Handicapped Act, Pub. L. 91-230, Title VI, 84 Stat. 121, 175-188 (1970) and subsequently amended).

[9] *See, e.g.*, S. Rep. No. 101-116, at 7 (1989) (quoting testimony of Judith Heumann, World Institute on Disability); *Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of House Comm. on Educ. and Labor*, 100th Cong. 132-133 (1988) (testimony of Barbara Waters).

tremendous adverse impact on the victims of the discrimination. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (noting the importance of education in maintaining our civic institutions and "the lasting impact of its deprivation on the life of the child").[10]

In addition, Congress was aware that people with disabilities were denied access to public facilities because their needs were rarely taken into account when public buildings and sidewalks were designed and built. Little or no consideration was given, for example, to the ability of people in wheelchairs or with visual impairments to use those public facilities. *See* U.S. Comm'n on Civil Rights, *supra*, at 21-22, 38-39; *see also Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong., 662-664 (1989) (testimony of Mary Lynn Fletcher). This lack of access adversely impacted the ability of people with disabilities to effectively participate in the state governmental process,

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[10] As this Court reasoned in *Plyler*: "The inestimable toll of that deprivation [education] on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." 457 U.S. at 222.

including the ability to exercise their right to vote[11] and to utilize the state judicial system.[12]

Illinois Attorney General Neil Hartigan also provided persuasive testimony based on the six years he had served as a state Attorney General. He testified regarding the persistent and widespread discrimination against people with disabilities involving, for example, public transportation, public services, public parks, publicly owned facilities, special education and elections. *See Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 75-78 (1989). Attorney General Hartigan urged passage of a uniform national standard to free people with disabilities from having to win their rights on a state-by-state basis.[13] *See*

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[11] *See, e.g., Hearing on H.R. 2273, Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 41, 45 (1989) (testimony of Nanette Bowling, staff liaison to mayor of Kokomo, Indiana) (describing "devastating disincentives to voting" faced by people with disabilities).

[12] *See, e.g., Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988: Hearing on H.R. 4498 Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 100th Cong. 40-41 (1988) (statement of Emeka Nwojke) (describing barriers faced by persons with disabilities that impeded their access to court).

[13] The legislative record shows that although some states had enacted disability laws, the state statutes varied greatly and many provided little meaningful protection against disability discrimination. *See, e.g., Americans With Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped,* 101st Cong. 334-337 (1989) (statement of Arlene Mayerson) (describing

id. at 77. He further explained that any meaningful legislation to combat disability discrimination must include a remedial provision. *See id.* at 80-81.

It is also significant that there was no opposition from the States to Congress's abrogation of their Eleventh Amendment immunity with respect to the ADA. In fact, the ADA was affirmatively endorsed by the National Association of Attorneys General and the National Association of Counties. *See* 135 Cong. Rec. 19,799 (1989).

Based on the foregoing, Congress clearly had compelling evidence of discrimination against people with disabilities, including unconstitutional discrimination by the States. Accordingly, the findings of Congress that underlie the enactment of the ADA, including those specifically relating to State actions, are soundly based.[14]

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limitations and ineffectiveness of existing State statutes); *Field Hearing on Americans with Disabilities Act: Hearing Before the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor,* 101st Cong. 89 (1989) (statement of Hon. Chet Brooks, Texas State Senate) ("Just as with other major civil rights issues addressed by our nation in the past, basic rights for people with disabilities have to be addressed at a national level. We cannot effectively piece these protections together state by state, person by person."). *See also* H. Rep. 101-485, pt. 2, at 47 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 329 ("State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing. . . . 'Too many States, for whatever reason, still perpetuate confusion.' ") (quoting testimony of Admiral James Watkins before the House Subcommittee on Select Education and the Senate Subcommittee on the Handicapped).

[14] *See* 42 U.S.C. § 12101(a)(3) (noting persistent discrimination in activities involving States, such as employment, housing,

b. Common sense shows that the States were participants in the pervasive culturally-based discrimination against people with disabilities.

Finally, beyond the legislative record,[15] it defies common sense to suggest that the perpetrators of pervasive discrimination against people with disabilities did not include agents of the States. As this Court has determined, discrimination against individuals with disabilities, which was widespread and based on irrational "myths" and "stereotypes," impacted our society's very culture. *See City of Cleburne*, 473 U.S. at 446; *Arline*, 480 U.S. at 279-85; and *Alexander*, 469 U.S. at 295 n.12. Under these circumstances, one cannot credibly argue that only

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public accommodations, education, transportation, institutionalization, health services, voting, and access to public services). This and the other Congressional ADA findings are entitled to great deference by this Court. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts establish be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." *Radice v. People of the State of New York*, 264 U.S. 292, 294 (1924). Moreover, "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government,' " a court does "not lightly second-guess such legislative judgments." *Board of Educ. of Westside Com. Sch. v. Mergens*, 496 U.S. 226, 251 (1990).

[15] *See Kimel*, 120 S. Ct. at 648 (indicating that review of the legislative record is but "one means" this Court has employed to determine the validity of Congressional enactments pursuant to Section 5 of the Fourteenth Amendment).

non-state entities discriminated against people with disabilities, but state officials, when making employment and other decisions on behalf of states, miraculously were not subject to the same cultural biases and irrational fears about individuals with disabilities.

Although in *Kimel* the Court refused to "extrapolate" conclusions with respect to the public sector, *see* 120 S. Ct. at 649, such an "extrapolation" is appropriate here. In *Kimel,* there was no record of pervasive societal age discrimination from which to extrapolate conduct to the States. *See id.* In this case, unlike *Kimel,* there is overwhelming evidence of invidious disability discrimination that was engrained in this country's culture. *See supra* pp. 10-15. *See also, e.g.,* S. Rep. No. 101-116, at 5-16 (1989); H.R. Rep. 101-485, pt. 2, at 28-43 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 310-325. As the House Report on the ADA concluded, people with disabilities "have been subjected to unequal and discriminatory treatment in a range of areas, based on characteristics that are beyond the control of individuals and resulting from stereotypical assumptions, fears and myths not truly indicative of the ability of such individuals to participate in and contribute to society." H.R. Rep. 101-485, pt. 2, at 40 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267, 322. The Senate Report made a similar determination. *See* S. Rep. 101-116, at 15 (1989). Of course, the conclusions reached by both the House and Senate are consistent with the Court's own statements on the subject. *See supra* pp. 6-7.

Due to this pervasive discrimination it is reasonable to conclude that the States were also participants in widespread discriminatory conduct against people with disabilities. This conclusion reflects human nature and

reality where a society-wide discriminatory bias has been established against individuals with disabilities. *See supra* pp. 11-12 (report of the Advisory Commission on Intergovernmental Relations documenting that 83% of state officials acknowledge that negative biases and stereotypes are impediments to States' hiring of people with disabilities). Indeed, Congress's findings of widespread discrimination were unqualified, including various activities engaged in by the States. *See supra* note 14. It properly determined that this pervasive disability discrimination infected state governments like all other parts of our society.

2. Given the substantial evidence of widespread culturally-based discrimination against people with disabilities, the ADA is a very measured and balanced response to remediate and deter disability discrimination.

The ADA's comprehensive response to the intractable and difficult problems facing people with disabilities is both congruent and proportional to the evils found by Congress. Section 5 of the Fourteenth Amendment authorizes Congress to take this remedial and preventative action to counter pervasive societal discrimination.

a. The ADA proscribes conduct that violates the Equal Protection Clause.

The ADA proscribes irrational discrimination on the basis of disability.[16] In so doing, the ADA seeks to ensure

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[16] ADA Title I prohibits employment discrimination against "an individual with a disability who, with or without

that decisions regarding employment or access to facilities, programs and services are rationally based and unaffected by arbitrary stereotypes or fears. *Cf. Arline*, 480 U.S. at 284-285 (noting that Rehabilitation Act aims to eliminate decisions affecting individuals with disabilities that are based on "prejudiced attitudes," "ignorance," "accumulated myths and fears" and to replace such reflexive actions with reasoned and sound judgments). This proscription falls squarely within the scope of the equal protection guarantees of the Fourteenth Amendment. *See City of Cleburne*, 473 U.S. at 446-48 (holding that arbitrary treatment of people with disabilities violates the Fourteenth Amendment).

b. The provisions of the ADA deter and prevent unconstitutional discrimination against people with disabilities.

Given the pervasiveness of past prejudices and inequitable actions directed toward individuals with disabilities, Congress determined in its legislative judgment that it was not enough to merely prohibit future unconstitutional discriminatory conduct. Rather, to deter and prevent pervasive culturally-based discrimination against

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reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. §§ 12111(8), 12112(a) (1994). ADA Title II prohibits public entities from discriminating against "an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. §§ 12131(2), 12132 (1994).

people with disabilities, and further implement its Section 5 powers, Congress required a "reasonable accommodation"[17] or "modification"[18] under Title I and II of the ADA, respectively, for qualified individuals with disabilities. A national problem of the magnitude documented by Congress and recognized by this Court, *see, e.g., City of Cleburne*, 473 U.S. at 454, 464-465, demands a solution that affirmatively prevents widespread societal disability discrimination and thus integrates individuals with disabilities into our society.

In this regard, the ADA exemplifies the kind of remedial legislation contemplated by this Court that "can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.' " *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (*quoting Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). In light of the extensive Congressional record and judicial acknowledgment of widespread and persistent culturally-based discrimination against people with disabilities, Congress was able to exercise its Section 5 powers with some latitude and respond to this very serious public concern. *See South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (stating that "[t]he constitutional propriety of [section 5 legislation] must be judged with reference to the historical experience . . . it reflects").

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[17] 42 U.S.C. § 12112(b)(5)(A)-(B) (1994).

[18] 42 U.S.C. § 12131 (1994).

As part of this legislative discretion, Congress chose to proactively require certain reasonable accommodations to better ensure that people with disabilities will be afforded equal protection of the law. Requiring such an accommodation prevents, for example, an employer from relying on societal biases and stereotypes to arbitrarily deny an individual with a disability an employment opportunity.[19] Under the ADA framework the employer must affirmatively consider reasonable ways in which the disability can be accommodated so that irrational assumptions about people with disabilities do not control the decisionmaking process. Even the dialogue between an employer and employee regarding a particular accommodation will foster the kind of rational discussion and understanding of disabilities that society has avoided in the past, and thereby deter continued discrimination.[20] This reasoned legislative approach to uproot a history of culturally-based disability discrimination enhances the prospect that people with disabilities will enjoy the protections afforded them under the Fourteenth Amendment.

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[19] Similarly, requiring an employer to eliminate unnecessary employment standards or practices that have a discriminatory effect on persons with disabilities, *see* 42 U.S.C. § 12112(b)(3)(A) (1994), further deters reflexive discrimination based on decades of engrained irrational fears and prejudices.

[20] *See, e.g.*, 29 C.F.R. § 1630, app. § 1630.9 (1999) (Equal Employment Opportunity Commission interpretive guideline regarding ADA states that "[t]he appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and [employee] with a disability").

The ADA, therefore, is similar to the ban on voting literacy tests imposed by the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, which *Katzenbach v. Morgan*, 384 U.S. 641 (1966), upheld as a proper Section 5 enactment even though such literacy tests themselves do not violate the Fourteenth Amendment.[21] In *Morgan*, the Voting Rights Act was used to invalidate a state literacy test requirement which directly impacted New York City's Puerto Rican community. *See* 384 U.S. at 644-647. The Court concluded that the literacy test ban "enables the Puerto Rican minority better to obtain 'perfect equality of civil rights and the equal protection of the laws,' " *id.* at 653, and the Court deferred to Congress's judgment regarding the need for the legislation.[22]

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[21] *See Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 50, 53 (1959).

[22] As the Court reasoned in *Morgan*:

> It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations – the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school. *It is not for us to review the congressional resolution of these factors. It is enough that we be able to*

Like the Voting Rights Act, the ADA, including the "reasonable accommodation" and "modification" provisions, places people with disabilities in a position where they are better able to obtain their constitutionally guaranteed rights to equal protection. As discussed above, *see supra* p. 21, the ADA creatively discourages the use of culturally-based biases and stereotypes which otherwise lead to unconstitutional discrimination against people with disabilities. This, in turn, results in a greater likelihood that people with disabilities will not be subjected to unconstitutional discrimination. The compelling evidence before Congress of pervasive societal discrimination against people with disabilities provided Congress, similar to the Voting Rights Act, with considerable leeway in adopting this legislative approach to deter and prevent continued disability discrimination.

c. Congress imposed important limitations in the ADA which evidence the congruent and proportional nature of the legislation.

In crafting the ADA, Congress carefully considered the needs of state governments, businesses, etc., and included important limitations in the law. *See City of Boerne*, 521 U.S. at 533 (stating that limiting provisions in legislation "tend to ensure Congress's means are proportionate to ends legitimate under Section 5"). For example, under Title I of the ADA, a "reasonable accommodation"

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perceive a basis upon which the Congress might resolve the conflict as it did.

384 U.S. at 653 (emphasis added).

of a person with a disability is not required if the accommodation would cause an "undue hardship"[23] or if the individual with the disability poses a "direct threat" to the health or safety of other people in the workplace.[24] Under Title II of the ADA, Congress required that a "reasonable modification" be made if it does not "fundamentally alter the nature of the public service, program, or activity."[25] In addition, the ADA does not apply to all individuals with physical or mental impairments, but rather, only to those whose impairments substantially limit their major life activities.[26]

These limitations moderate the effect of the law on the States. They give real balance to the legislation by providing for the proper functioning of state government, but without sacrificing meaningful protection against disability discrimination. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 119 S. Ct. 2176 (1999).[27] As such, the limitations

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[23] 42 U.S.C. §§ 12111(10), 12112(b)(5)(A) (1994).

[24] 42 U.S.C. §§ 12111(3), 12113(b) (1994).

[25] 42 U.S.C. § 12131(2) (1994); 28 C.F.R. § 35.130(b)(7) (1999).

[26] 42 U.S.C. § 12102(2) (1994). Last term, for example, this Court held that measures that correct for, or mitigate, a physical or mental impairment must be taken into account when judging whether a person is substantially limited in a major life activity and thus covered by the law. *See Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999).

[27] In *Olmstead*, the Court interpreted the "fundamental alteration" provision to give the States considerable latitude to administer their programs for people with mental disabilities. 119 S. Ct. at 2189. As reasoned by the Court:

> Sensibly construed, the fundamental alteration component of the reasonable-modifications regulation would allow the State to show that, in the

in the ADA are a significant part of the law's congruence and proportionality.

In summation, the ADA's uniform, national approach to substantial nationwide discrimination is a proper use of Congress's Fourteenth Amendment authority.[28] The "reasonable accommodation" and "modification" provisions certainly will deter invidious discrimination against people with disabilities, *see supra* pp. 20-22, a permissible use of Congress's Section 5 powers. *See City of Boerne*, 521 U.S. at 518. At the same time, the limits Congress imposed in the ADA mitigate significantly the impact of this remedial legislation on the States. Consequently, the ADA represents a "congruent and proportional" legislative response to an extensively documented and very serious problem, rampant culturally-based discrimination

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> allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities.

Id.

[28] *See Oregon v. Mitchell*, 400 U.S. 112 (1970) which states:

> In imposing a nationwide ban on literacy tests, Congress has recognized a national problem for what it is – a serious national dilemma that touches every corner of our land. In this legislation Congress has recognized that discrimination on account of color and racial origin is not confined to the South, but exists in various parts of the country. Congress has decided that the way to solve the problems of racial discrimination is to deal with nationwide discrimination with nationwide legislation.

Id. at 133-34 (citations omitted).

against members of our society with disabilities.[29] Congress therefore acted well within its Section 5 powers in crafting the ADA.

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[29] The ADA is in stark contrast to the legislation considered by the Court in *City of Boerne* and *Kimel,* where the legislative record contained no evidence of widespread societal discrimination and Congress made no such findings. Also, unlike the Religious Freedom Restoration Act considered in *City of Boerne* and the Age Discrimination Employment Act analyzed in *Kimel,* the ADA's remedial provisions are commensurate with the substantial public concerns identified by Congress's comprehensive review of the culturally-based unequal treatment of people with disabilities.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Eleventh Circuit Court of Appeals and hold that Congress, in enacting the ADA, validly abrogated the States' Eleventh Amendment immunity pursuant to Section 5 of the Fourteenth Amendment.

Respectfully submitted,

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